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Responsibility of States for internationally wrongful acts

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Compilation of decisions of international courts, tribunals and other bodies

Report of the Secretary-General

Addendum

1. The present addendum reproduces the relevant passages of two international decisions referring to the articles on responsibility of States for internationally wrongful acts that were published after the completion of the report of the Secretary General (A/62/62) on 1 February 2007. Those decisions are the judgment rendered by the International Court of Justice on the merits of the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (hereinafter the "2007 judgment in the *Genocide* case")[1] and the partial award by the arbitral tribunal constituted to hear the case of Eurotunnel against the United Kingdom and France (hereinafter the "2007 partial award in the *Eurotunnel* case").[2]

* A/62/50.

[1] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, 26 February 2007* (hereinafter the "judgment in the *Genocide* case").

[2] *In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 19 of the Treaty between the French Republic and the United Kingdom of Great Britain and Northern Ireland Concerning the Construction and Operation by Private Concessionaries of a Channel Fixed Link Signed at Canterbury on 12 February 1986 between 1. The Channel Tunnel Group Limited 2. France-Manche S.A. and 1. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland 2. Le Ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République Française, Partial Award, 30 January 2007* (hereinafter the "partial award in the *Eurotunnel* case").

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Article 4
Conduct of organs of a State

International Court of Justice

2. In its 2007 judgment in the *Genocide* case, the Court, in examining the question whether the massacres committed at Srebrenica (which it had found to be a crime of genocide within the meaning of articles II and III, paragraph (*a*), of the Genocide Convention) were attributable, in whole or in part, to the Respondent, considered the question whether those acts had been perpetrated by organs of the latter. The Court referred to article 4 finally adopted by the International Law Commission in 2001, stating that this question

> "relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility ...".[3]

The Court thereafter applied this rule to the facts of the case. In that context, it observed inter alia that "[t]he expression 'State organ', as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (cf. ILC Commentary to Art. 4, para. (1))".[4] The Court concluded that "the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it and thus do not on this basis entail the Respondent's international responsibility"[5] and it went on to consider the question of attribution of the Srebrenica genocide to the Respondent on the basis of direction or control (see para. 3 below).

Article 8
Conduct directed or controlled by a State

International Court of Justice

3. In its 2007 judgment in the *Genocide* case, the Court, in examining the question whether the massacres committed at Srebrenica were attributable, in whole or in part, to the Respondent, after having found that these acts had not been perpetrated by organs of the latter, went on to examine whether the same acts had been committed under the direction or control of the Respondent. The Court noted, with reference to article 8 finally adopted by the International Law Commission in 2001, that

> "398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility ...

[3] Judgment in the *Genocide* case, para. 385.

[4] Ibid., para. 388.

[5] Ibid., para. 395.

"399. This provision must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* ... In that Judgment the Court, ... after having rejected the argument that the *contras* were to be equated with organs of the United States because they were 'completely dependent' on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself 'directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State' (*I.C.J. Reports 1986*, p. 64, para. 115); this led to the following significant conclusion:

> 'For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.' (*Ibid.*, p. 65.)

"400. The test thus formulated differs in two respects from the test [described in paragraphs 390-395 of the judgment] to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of 'complete dependence' on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

"401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the 'effective control' of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (see paragraph 399 above). The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

"402. The Court notes however that the Applicant has ... questioned the validity of applying, in the present case, the criterion adopted in the *Military*

and Paramilitary Activities Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the *Tadić* case (IT-94-1-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the *Military and Paramilitary Activities* case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY [Federal Republic of Yugoslavia] under the law of State responsibility, was that of the 'overall control' exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, *ibid.*, para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS [the army of the Republika Srpska], without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control.

"403. The Court has given careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

"404. This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the 'overall control' test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the 'overall control' test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

"405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the

degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.

"406. It must next be noted that the 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the 'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.

"407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility."[6]

The Court concluded thereafter that the relevant acts could not be attributed to the Respondent on this basis.[7]

Article 14
Extension in time of the breach of an international obligation

International Court of Justice

4. In its 2007 judgment in the *Genocide* case, the Court, in examining whether the Respondent had complied with its obligations to prevent genocide under article I of the Genocide Convention, referred to the "general rule of the law of State responsibility" stated in article 14, paragraph 3, finally adopted by the International Law Commission in 2001:

"a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law

[6] Ibid., paras. 398-407.

[7] The Court did consider it necessary to decide whether articles 5, 6, 9 and 11 finally adopted by the International Law Commission in 2001 expressed present customary international law, it being clear that none of them applied in the case (Judgment in the *Genocide* case, para. 414).

of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility: ...

"This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent."[8]

Article 16
Aid or assistance in the commission of an internationally wrongful act

International Court of Justice

5. In its 2007 judgment in the *Genocide* case, the Court, in examining whether the Respondent was responsible for "complicity in genocide" under article III, paragraph (*e*), of the Genocide Convention, referred to article 16 finally adopted by the International Law Commission in 2001, which it considered as reflecting a customary rule:

"In this connection, reference should be made to Article 16 of the ILC's Articles on State Responsibility, reflecting a customary rule ...

"Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between 'complicity in genocide', within the meaning of Article III, paragraph (*e*), of the Convention, and the 'aid or assistance' of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 — setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. In other words, to ascertain whether the Respondent is responsible for 'complicity in genocide' within the meaning of Article III, paragraph (*e*), which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished 'aid or assistance' in the commission of the

[8] Judgment in the *Genocide* case, para. 431.

genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility."[9]

Article 31
Reparation

International Court of Justice

6. In its 2007 judgment in the *Genocide* case, the Court, having found that the Respondent had failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide, referred to article 31 finally adopted by the International Law Commission in 2001 in the context of its examination of the question of reparation:

> "The principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the *Factory at Chorzów* case: that 'reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed' (*P.C.I.J. Series A, No. 17*, p. 47: see also Article 31 of the ILC's Articles on State Responsibility)."[10]

Article 36
Compensation

International Court of Justice

7. In its 2007 judgment in the *Genocide* case, the Court, having found that the Respondent had failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide, referred to article 36 finally adopted by the International Law Commission in 2001 in the context of its examination of the question of reparation:

> "In the circumstances of this case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of *restitutio in integrum*. Insofar as restitution is not possible, as the Court stated in the case of the *Gabčikovo Nagymaros Project (Hungary/Slovakia)*, '[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it' (*I.C.J. Reports 1997*, p. 81, para. 152.; cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 198, paras. 152-153; see also Article 36 of the ILC's Articles on State Responsibility)."[11]

[9] Ibid., para. 420.
[10] Ibid., para. 460.
[11] Ibid., para. 460.

Article 47
Plurality of responsible States

International arbitral tribunal

8. In its 2007 partial award in the *Eurotunnel* case, the arbitral tribunal constituted to hear the case, in examining the Claimants' thesis of the "joint and several responsibility" of the Respondents (France and the United Kingdom) for the violation of the Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link (the "Treaty of Canterbury") and the Concession Agreement that followed, referred to article 47 finally adopted by the International Law Commission in 2001, and the commentary thereto:

> "173. It is helpful to start with Article 47 of the ILC Articles on State Responsibility, to which all Parties referred in argument. ...
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> "174. As the commentary notes:
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> 'The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several or solidary responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.'"[12]

Article 58
Individual responsibility

International Court of Justice

9. In its 2007 judgment in the *Genocide* case, the Court, in response to the Respondent's argument that the nature of the Genocide Convention was such as to exclude from its scope State responsibility for genocide and the other enumerated acts, referred to article 58 finally adopted by the International Law Commission in 2001, and the commentary thereto:

> "The Court observes that that duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: 'No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.' The Court notes also that the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly resolution 56/83, 12 December 2001) ... affirm in Article 58 the other side of the coin: 'These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.' In its Commentary on this provision, the Commission said:
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> 'Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in

[12] Partial award in the *Eurotunnel* case, paras. 173-174.

question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.' (ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58, para. 3.)

The Commission quoted Article 25, paragraph 4, of the Rome Statute, and concluded as follows:

'Article 58 ... [makes] it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term 'individual responsibility' has acquired an accepted meaning in light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.'"[13]

[13] Judgment in the *Genocide* case, para. 173.